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No. 85-485

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

IN RE JOHN W. GIBSON,

Appellant.

ON APPEAL FROM THE SUPREME COURT IN WISCONSIN

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT OF MOTION TO DISMISS AND/OR IN OPPOSITION TO ALTERNATIVE PETITION FOR CERTIORARI

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BEST AVAILABLE COPY

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MOTION TO DISMISS APPEAL

Now comes the appellee, State of Wisconsin Board of Professional Responsibility, and moves to dismiss the appeal of appellant John Gibson in that it fails to state a substantial question, as more fully set forth in the appellee's brief in support of the motion, and in response to the Jurisdictional Statement

filed with this Court on September 19, 1985.

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ON APPEAL FROM THE SUPREME COURT IN WISCONSIN

BRIEF IN OPPOSITION TO APPEAL AND ALTERNATIVELY IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED

1. Whether an attorney who is disciplined for making sexual advances toward a female client which include touching her breasts and thighs, in the course of the attorney client relationship, has received "fair notice of the charge" when the discipline is imposed on a theory other than the

particular rule of conduct set forth in the charge; but where the discipline as imposed and the discipline as charged are based upon the same asserted facts and where the conduct charged as prohibited under the rule of conduct is the same conduct determined to have violated a standard previously announced by the state supreme court in an earlier reported disciplinary decision.

2. Whether a 1973 reported disciplinary decision, which detailed a number of actions including sexual conduct, sexual gestures, sexual proposals made towards clients which the state supreme stated could not be condoned, constituted notice to an attorney in 1982 that unsolicited sexual advances to a client and the touching of the clients private sexual parts was a basis for discipline.

3. Whether in 1982, an attorney licensed to practice was necessarily charged with a knowledge that unsolicited sexual advances and the touching of a clients breasts, and thighs in the course of the attorney client relationship was conduct for which the attorney could be disciplined.

4. Whether a male attorney who was aware that sexual activity with a female client in the course of the attorney client relationship could lead to a loss of his license, had "fair notice" of the charge when the facts alleged in the discipline proceedings all concerned unsolicited sexual advances and sexual touching of a female client in the course of the attorney client relationship, but the standard of conduct charged was a particular supreme court rule proscribing conduct which prejudiced or damaged the

client during the course of the professional relationship while the rule under which the discipline was imposed was based on a previous reported decision that prohibited sexual advances and sexual touching of a client.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....1

OPINIONS BELOW.....8

JURISDICTION OF THIS COURT.....8

CONSTITUTIONAL PROVISIONS 9

STATEMENT OF THE CASE.....10

I. The Charges.....10

II. The Proceedings.....11

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL.....13

CONCLUSION.....23

CASES CITED

Attorney Grievance Comm. v. McBurney,
282 Md. 116, 383 A.2d 58 (1978)...19

Barnes v. Costle,
561 F.2d 983 (D.C. Cir. 1977).....18

Committee on Professional Ethics
and Grievances v. Johnson,
447 F.2d 169 (3rd Cir. 1971)......20

CSC v. Letter Carriers,
413 U.S. 548 (1972).....22

In re Ruffalo,
390 U.S. 544
(1968).....13, 14, 15, 18

In re Wright,
310 A.2d 1 (1973).....19

People v. Emerson,
638 P.2d 293 (Colo. 1981).....20

State v. Heilprin,
59 Wis. 2d 312,
207 N.W. 2d 878.....12, 15, 17,
.....18, 21, 22, 23, 24

Zauderer v. Office of
Disciplinary Counsel,
___ U.S. ___, 85 L. Ed. 2d
652 (1985).....15

CONSTITUTIONAL AMENDMENTS

U. S. Const. amend. XIV, § 1.....9

WISCONSIN STATUTES

Sec. 940.225.....19

OTHER AUTHORITIES

Wisconsin Supreme Court Rule
20.05(5).....9

Wisconsin Supreme Court Rule
20.35(1)(c).....10, 12

Wisconsin Supreme Court Rule
21.05(5).....16

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court and the Referee's Report and Recommendation are contained in the Jurisdictional Statement filed by Appellant.

JURISDICTION OF THIS COURT

This is an appeal from a disciplinary determination of the Wisconsin Supreme Court in an attorney discipline matter. The appellant contends that there was a failure of "fair notice" and that the decision was vague. Appellant contends that the appeal presents a substantial issue involving due process.

The appellee, herein, asserts in this brief that the appellant received fair notice of the misconduct charged, that the decision upon which the

determination of misconduct was based was clear to any reasonable interpretation by attorneys, and that in any event the appellant knew or should have known that the sexual conduct he engaged in was prohibited conduct.

CONSTITUTIONAL PROVISIONS

Section 1 of the fourteenth amendment to the United States Constitution provides:

> nor shall any State deprive any person of life, liberty or property without due process of law ...

Wisconsin Supreme Court Rule 20.05(5) provides:

> An attorney is subject to discipline for misconduct. Misconduct is conduct that violates
>
> ...
>
> (5) A standard of professional conduct as defined by the supreme court by rule, order or decision.

STATEMENT OF THE CASE

I. The Charges.

This appeal is from a suspension imposed upon a licensed male attorney by the Wisconsin Supreme Court. The discipline arose out of a complaint by a female client in alleging that the appellant had made sexual advances towards her which included placing his hand inside of her bra and touching her breasts and placing his hand under her clothing and touching her pelvic area (A.-Ap. B-2-3). On the basis of this complaint, the State Board of Attorneys Professional Responsibility filed a complaint detailing the alleged conduct and charging it as a violation of the Wisconsin Supreme Court Rule 20.35(1)(c) [DR 7-101(a) (3)] which proscribes conduct that intentionally prejudices or

damages the client during the course of the professional relationship.

The appellant denied the conduct alleged and contended that the conduct would not violate the disciplinary rule.

II. The Proceedings.

In accordance with the Wisconsin practice, a referee was appointed to hear the matter. At the hearing the Board set forth the conduct alleged. The appellant denied the conduct, and contended that the conduct did not violate the rule of professional conduct.

On January 2, 1985, the referee submitted a report and recommendations. The referee found that the appellant had engaged in the conduct alleged (A.-Ap. B-10-11). The referee did not specifically reach a conclusion as to

whether the conduct violated SCR 20.35(1)(c), but concluded that the conduct violated a number of ethical considerations and recommended a 90 day suspension (A.-Ap. B-14-15).

The Wisconsin Supreme Court accepted the findings of fact by the referee to the effect that the conduct had occurred as charged, but decided it was unnecessary to determine whether the conduct violated SCR 20.35(1)(c), because it concluded that the conduct violated a standard of conduct that had been enunciated in its 1973 decision in State v. Heilprin, 59 Wis. 2d 312, 313, 207 N.W.2d 878 (A.-Ap. A-8).

The supreme court accepted the recommendation as to the discipline and directed a 90 day suspension. In addition to the suspension, and in

accordance with Wisconsin procedure, the court directed the appellant to pay the costs of the discipline action which amounted to $9,193.35. The appellant raised the issues presented here in a Motion for Reconsideration in the Wisconsin Supreme Court (A. Juris. Statement-4).

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

The appellant contends that this appeal raises a substantial question of due process notice, as first enunciated in In re Ruffalo, 390 U.S. 544 (1968). In Ruffalo, this court concuded that an attorney, Ruffalo, had been denied due process when having been charged with hiring another to "solicit" clients and having testified at length that he had actually hired the man to "investigate" cases, was then for the first time

charged with a violation of hiring the man to "investigate."

This court quite correctly concluded that the process was a trap, and that Ruffalo had a due process right to know that the charge would be hiring an investigator before he defended himself by testifying that he did the hiring. The defect in Ruffalo was that the attorney did not have knowledge that the activity of hiring an investigator would become the prohibited conduct. Moreover the conduct, hiring an investigator, was not the type of conduct that should be apparent to a scrupulous person, was improper. Ruffalo (separate opinion) at 536.

In this case, the actions that appellant was alleged and found to have committed were the same actions that the discipline was imposed for, the sexual

conduct towards a female client. The "charge" did not alter from the hearing to the Wisconsin Supreme Court decision, only the reasoning towards the violation differed. The discipline action here was imposed for the conduct charged, but under a different theory.

As this court noted in Zauderer v. Office of Disciplinary Counsel, ___ U.S. ___, 85 L. Ed. 2d 652 (1985) at n. 18, "the difference between the theory of the Office of Disciplinary Council and the Board of Bar Commissioners had no such prejudical effect on appellant." In this instance, appellant had an opportunity to respond to the application of Heilprin on his Motion for Reconsideration to the Wisconsin Supreme Court.

Unlike Ruffalo, there was no trap. Appellant was charged with unsolicited

sexual conduct with a female client during the attorney-client relationship and was disciplined for the unsolicited sexual conduct. The difference between the referee's recommendation and the decision of the Wisconsin Supreme Court was simply a difference in the "theory" of how unsolicited sexual conduct and sexual touching constituted a violation of professional conduct.

There is no disagreement between the decisions of this Court and other courts that is relevant to the appeal. All of the courts, and this Court agree that an attorney is entitled to notice of the conduct that he/she is charged with committing. Under Wisconsin rules, misconduct is defined as conduct that violates a standard of professional conduct defined by the supreme court by rule, order, or decision (SCR

21.05(5)). The Wisconsin court could base its conclusion of misconduct on a standard articulated by the code or set forth in a decision such as the Heilprin decision.

The appellant is not asserting a substantial due process question, but rather a semantic quibble. Appellant knew that the issue was whether or not he had engaged in unsolicited sexual advances to a female client (A.-Ap. B-3, Tr. 36). This is the matter that was heard and the basis for the discipline. Appellant had fair notice.

The quibbling nature of the appellant's argument is underscored by the testimony of the client that appellant had previously told her that if he had a sexual relationship with a

client he could lose his license (A.-Ap. B-3; Tr. 36).

In the separate opinion of Justices White and Marshall in Ruffalo, at page 555, it is noted that even when a disciplinary standard is unspecific, members of the bar can be "assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment...." Certainly by 1982, even without the publication of the decision in Heilprin, "responsible" attorneys would recognize the type of sexual conduct charged and proved against this appellant was improper for a member of the bar. At least as early as 1977, unsolicited sexual advances towards employes was prohibited conduct, Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977). The type of sexual touching found to have occurred in

this matter also was contrary to the Wisconsin Criminal Code, sec. 940.225, Stats. The conduct engaged in by the appellant was indeed the type of conduct that any responsible attorney should have known was improper within the attorney-client relationship. Appellant not only should have known that his actions were improper, but did know that sexual advances to a female client were improper.

The decisions of other states support a conclusion that the appellant had fair notice. In Attorney Grievance Comm. v. McBurney, 282 Md. 116, 383 A.2d 58 (1978), the Maryland court held that a specific rule designation was not required so long as the charges advised of the misconduct alleged. In In re Wright, 310 A.2d 1 (1973), it was sufficient that the attorney have notice

of the factual matters alleged as misconduct.

The appellant's contention that a set of court decisions supports the appellant's assertion is not accurate. Thus, in People v. Emerson, 638 P.2d 293, 294 (Colo. 1981), the fault was the failure to advise the attorney of all of the conduct he was to defend against, tax returns. In Committee on Professional Ethics and Grievances v. Johnson, 447 F.2d 169 (3rd Cir. 1971), different "conduct" was charged as the basis for discipline after most of the testimony had been taken. A corollary to Comm. v. Johnson, must be that there would be no violation of due process so long as all of the "wrongful conduct" for which the discipline is imposed is charged.

There is no dispute that an attorney is entitled to "fair notice" of the

misconduct for which he is charged. The sufficiency of the notice is a matter that may be determined with reference to the particular proceedings. As a general proposition, "fair notice" informs of the conduct charged, avoids creating a trap, and is not equivalent to a charge in the theory under which a conclusion is reached that particular conduct is improper. In some instances, as here, the impropriety of the conduct is so clear that the attorney must have realized that it was prohibited.

The appellant contends that his conduct was not included in the prohibitions of the Heilprin decision. Assuming that it was even necessary in 1982 that the Wisconsin Supreme Court specifically held that sexual advances towards a client were improper, the Heilprin decision is not vague. In

Heilprin, the Wisconsin court enumerated a series of actions committed by Heilprin, including sexual touching, and sexual advances, Heilprin at 315. The Wisconsin court held that "Conduct of the type engaged in by Heilprin cannot be condoned, whatever the cause. The public must not be exposed to this type of action from members of the legal profession...." Heilprin at 322. Appellant contends that a reading of the Heilprin case only prohibits aggressive, hostile conduct. While it is true that the decision does prohibit more egregious misconduct, it also clearly prohibits the sexual conduct that was enumerated in Heilprin as conduct of the type that could not be condoned.

In CSC v. Letter Carriers, 413 U.S. 548, 579 (1972), this court observed that although the prohibitions in that case

"may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with...." Likewise, although a fault-finder could pick at the language in Heilprin, an ordinary attorney could understand that after Heilprin, at least, unwanted sexual touching and sexual advances were prohibited conduct.

CONCLUSION

Appellant presents no substantial question. The requirement of "fair notice" is settled. Equally settled is that "fair notice" is notice of the conduct charged as wrongful and for which the discipline is imposed, and is not the theory why the charged conduct is misconduct.

Appellant's assertion that Heilprin is vague is wholly without merit. The blunt statement in Heilprin, that conduct of the type outlined and detailed would not be condoned is less ambiguous than the usual standards of conduct and is not vague, at least not to attorneys exercising ordinary common sense.

The court should not note probable jurisdiction, and the appeal should be dismissed.

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